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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE
TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE
METLAKATLA INDIAN COMMUNITY
IN SUPPORT OF RESPONDENTS

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Pursuant to Rule 37, the Metlakatla Indian Community submits this brief amicus curiae because it has a significant interest in responding to assertions made by Petitioner and Amici regarding the status of the Community's reservation.¹

¹ Pursuant to Supreme Court Rule 37.6, counsel for Metlakatla Indian Community states that those attorneys listed on this brief authored the brief in whole. No other person or entity, or other than the amicus curiae made a monetary contribution to the preparation or submission of this brief. Letters of consent as required by Supreme Court Rule 37.3 are appropriately filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

Amicus Metlakatla Indian Community, a federally-recognized tribe ("the Community") submits this brief to correct significant misstatements and unsupported assertions regarding the status of the Annette Islands Reserve as "Indian country" under federal law, by Petitioner, State of Alaska, and Amici, Alaska Fish & Wildlife Federation and Outdoor Council, Inc., and Alaska Fish and Wildlife Conservation Fund, Inc., all of whom have asserted that the Reserve is not Indian country and further imply that the State of Alaska has jurisdiction over fishing within the Reserve. These statements are not supported by the law and this Court should not come to any such conclusions regarding the Indian country status of the only remaining federally established reservation in Alaska. In fact, if this Court addresses Metlakatla, it should be to acknowledge its status as a federal Indian reservation and as Indian country under 18 U.S.C. § 1151(a) (1988).

SUMMARY OF ARGUMENT

The Annette Islands Reserve has been recognized by Congress, the Executive Branch and the Judiciary as the reservation of the Metlakatla Indian Community. The Reserve was set aside by statute. As such it constitutes Indian country under 18 U.S.C. § 1151(a).

ARGUMENT

I. CONGRESS HAS REPEATEDLY DESIGNATED AND RECOGNIZED THE ANNETTE ISLAND RESERVE AS AN INDIAN RESERVATION AND INDIAN COUNTRY.

Amicus Metlakatla Indian Community is a federally recognized tribe exercising jurisdiction over the Annette Islands Reserve in Southeast Alaska. The Tribe governs itself under a Constitution and Bylaws approved on August 23, 1944, by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act. 25

U.S.C. § 476 (1970). The Community's tribal sovereign status has been recognized and confirmed by Congress, the Executive Branch, and the Judiciary.²

The Annette Islands Reserve was established by Congress for "the use of the Metlakatla Indians, and those people known as the Metlakatlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaska Natives as may join them." Act of March 3, 1891, 26 Stat. 1101, 25 U.S.C. § 495.³ This is the only currently existing federal Indian reservation within the State of Alaska, its reservation status being expressly preserved by section 19 of the Alaska Native Claims Settlement Act ("ANCSA"). 43 U.S.C. § 1618 (1986).⁴

² For Congressional recognition see, e.g., 25 U.S.C. §§ 450-450n (1975), 25 U.S.C. § 495 (1891). For executive recognition see 25 U.S.C. § 476 (1970); 25 C.F.R. §§ 81.1-81.24 (1990). For judicial recognition see *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). See also *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977).

³ In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918), this Court described the reasons for the establishment of Annette Islands Reserve:

"The purpose of creating the reservation was to encourage, assist, and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining, and advance to the ways of civilized life."

⁴ The Community was excluded from the benefits of the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 19(a), 85 Stat. 688, 710 (1971) (current version at 43 U.S.C. § 1618(a) (1982)), which states:

"Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under section 497 of Title 25, are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Islands Reserve established by section 495 of Title 25 and no person enrolled in

Metlakatla's reservation and Indian country status has been expressly recognized by Congress and this court. The 1891 Act states that the lands are "set apart as a reservation for the use of the Metlakatla Indians" and, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918), this Court specifically concluded that this Act created a federal Indian reservation.

In 1934, Congress enacted a law granting citizenship to the Indians of Metlakatla. In so doing, Congress reaffirmed the 1891 reservation and federal supervision over it.

"The granting of citizenship to the said Indians shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakahtla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to modification, alteration, or repeal by the Congress or the President, respectively."

Act of May 7, 1934, 48 Stat. 667.

In 1958, Congress extended Pub. L. 280 criminal and civil jurisdiction to all Indian country in Alaska thereby transferring jurisdiction from the Federal government to the State. 18 U.S.C. § 1162(a) as amended, Pub. L. 85-615, 72 Stat. 545 (1958).⁶ In 1970, Congress enacted

the Metlakatla Indian Community of the Annette Island Reserve shall be eligible for benefits under this chapter." (Emphasis added).

⁶ The purpose of Pub. L. 280 is to delegate existing federal jurisdiction within Indian country to certain states. By definition, the existence of Indian country is a prerequisite to the exercise of state jurisdiction under this law. See F. Cohen, *Handbook of Federal Indian Law* 361 (1982 ed.).

an amendment to 18 U.S.C. § 1162 specifically addressing jurisdiction on Metlakatla. The purpose of the legislation was to restore to the tribe concurrent criminal jurisdiction over minor offenses that it had exercised prior to transfer of jurisdiction to the State. H.R. Rep. No. 1545, 91st Cong., 2d Sess. (1970) reprinted in 1970 U.S. Code Cong. and Admin. News, 4783, 4784.

In enacting the bill, the House Report described the state of jurisdiction on Metlakatla. It gives strong factual support that the Reserve constitutes Indian country.

"The Metlakatla Indian Community was established in 1887 by a group of Indians under the leadership of a missionary, Father Duncan. Father Duncan and his group had come to Alaska at the invitation of President Cleveland and had been assured that such areas as they might choose for themselves would be set aside for their use and occupancy. The Indians chose the Annette Islands in Southeast Alaska and under the act of March 3, 1891, 26 Stat. 101, 48 United States Code section 358, the Annette Islands were 'set apart as a reservation for the use of the Metlakatla Indians * * * and such other Alaskan natives as may join them.' This law had the legal effect of creating on the Annette Islands an Indian reservation similar to the reservations in other States of the Union."

H.R. Rep. No. 1545, 91st Cong., 2d Sess. (1970) reprinted in 1970 U.S. Code Cong. & Admin. News, 4783, 4784.

Congress further noted that Metlakatla had historically been a tribal government exercising jurisdiction over its territory.

"The Metlakatlans created a model community and a model government on the Annette Islands. They set up rules for the election of a mayor and council. They arranged for their own community to furnish governmental services, including education. They

laid out their streets and planned systematically for the growth of their town. They also enforced law and order as far as misdemeanor offenses were concerned. Major offenses were the responsibility of the Federal Government.

"In 1934 Congress, by enacting the Indian Reorganization Act, 48 Stat. 984, 25 United States Code section 476, provided a system by which Indian tribes could organize themselves and could have their organization recognized under Federal law. Pursuant to that law the Metlakatla Indian Community adopted a constitution and bylaws which codified its preexisting governmental structure. The constitution and bylaws were approved by the Department of the Interior on August 23, 1944, and therefore brought Metlakatla's well-established system of government within the framework of the Indian Reorganization Act. The Indian community had jurisdiction over minor criminal offenses under its federally recognized government. However, when the act of August 8, 1958 was passed giving Alaska jurisdiction over offenses by or against Indians in all Indian country within the Territory of Alaska, it had the effect of eliminating the legal basis for the jurisdiction exercised by the community over minor offenses. As Commissioner Bruce stated at the hearing, enactment of the bill would reinvest the Metlakatla Community Council with local legislative authority and police powers to enforce its laws over minor criminal offenses in the Indian community would remain exclusively with the State."

Id.

Thus, at the time this law was enacted, Congress acknowledged that Metlakatla was a federal Indian reservation "similar to the reservations in other States of the Union" and that "major offenses on the reservation were the responsibility of the Federal government [under the Major Crimes Act, 18 U.S.C. §§ 1151 and 1152]." It also acknowledged that Metlakatla, not the State, had jurisdiction over minor criminal offenses.

Indeed, if Metlakatla was not an Indian reservation included within the statutory definition of Indian country, the original transfer of jurisdiction to the State would have been superfluous and there would have been no need for the federal government to restore criminal jurisdiction to the tribe by the amendment. Thus, Congress has repeatedly stated and reaffirmed Metlakatla's status as a reservation and Indian country.

II. THE EXECUTIVE BRANCH HAS REPEATEDLY TREATED THE ANNETTE ISLANDS RESERVE AS A STATUTORY INDIAN RESERVATION SATISFYING THE DEFINITION OF "INDIAN COUNTRY."

The Executive Branch has also repeatedly recognized the Reserve, both land and surrounding waters, as Indian country over which the United States and the Metlakatla Indian Community have jurisdiction.

On April 28, 1916, two years prior to this Court's decision in *Alaska Pacific Fisheries, supra*, the President of the United States issued a Presidential Proclamation (Proc. 1332) entitled "Annette Island Fishery Reserve," 39 Stat. 1777, stating that waters within three thousand feet from the shore lines at mean low tide of Annette and certain adjacent islands were reserved for the use of the Metlakatla Indians. This Proclamation recited and relied upon the fact that the Annette Islands had, by the 1891 legislation, been "set apart as a reservation for the use of the Metlakatla Indians . . . to be held and used by them in common, under such rules and regulations and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

On January 28, 1915, the Secretary of the Interior, pursuant to the 1891 statute, issued regulations for the local government of the Reserve under which substantial governmental authority was exercised by the Community. (Formerly 25 C.F.R. 1.1—1.68).

On August 24, 1944, the Community adopted a Constitution and Bylaws at an election called and held by the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. § 476. See House Report quoted above at p. 5. Under the Constitution and Bylaws, approved by the Secretary of the Interior and adopted by the Community, the Community has jurisdiction over the Reserve, its Council has the authority to pass ordinances for the local government of the Community and it has established courts to exercise the civil, criminal and appellate jurisdiction of the Community within the lands and waters of the Annette Islands Reserve.

Although this Court held in *Alaska Pacific Fisheries*, *supra*, that the reservation included the Annette Islands and the surrounding and intervening waters, the maritime boundary had not been officially surveyed until recently. On September 26, 1995, the Secretary of the Interior approved a cadastral survey of the maritime boundaries of the Annette Islands Reserve performed pursuant to the Secretary's authority under 25 U.S.C. § 176 to survey the boundaries of Indian and other reservations.

The Secretary issued regulations governing the waters of the Annette Islands Reserve. See e.g. 28 Fed. Reg. 7183 (July 12, 1963). In the absence of a survey of the maritime boundaries of the Reserve, the Secretary's regulations applied to the waters covered by a Presidential Proclamation of April 28, 1916, 39 Stat. 1777. Following the Secretary's approval of the boundary survey, the Metlakatla Indians have exercised their exclusive fishery rights within these boundaries, as provided in the regulations of the Secretary.

The regulations reiterate the Presidential Proclamation's designation of the reservation waters as an exclusive fishery for the Metlakatla Indians and permit commercial fishing, including fishing with traps (as permitted by the decision in *Metlakatla v. Egan*, 369 U.S. 48 (1962)).

The regulations provide for enforcement by any duly authorized representative of the Secretary of the Interior. See 25 C.F.R. Part 241 (1997).

The Solicitor of the Department of the Interior has also issued several opinions regarding the status of Metlakatla. In 1937, the Solicitor concluded that federal laws governing the introduction of liquor into Indian country would apply to Metlakatla because it is an Indian reservation. Solicitor's Opinion M-29147, 56 I.D. 137 (May 6, 1937).

In 1943, the Solicitor considered whether Metlakatla was subject to a territorial school tax. The Solicitor concluded that Metlakatla was a tribe living on "a reservation under Federal jurisdiction" and as such was exempt from the tax. Opinion dated Feb. 24, 1943, reprinted in Opinions of the Solicitor of the Dept. of the Interior, 1917-1971, Vol. II, p. 1196.

In 1956, the Solicitor considered whether a federal school building and underlying land located in Metlakatla could be transferred to the Community under a federal statute permitting the transfer of public domain lands. The Solicitor held the Transfer Act did not apply to Metlakatla because the lands upon which the school rested were not public domain lands but a federal Indian reservation. Opinion dated January 11, 1956, *id.* at 1701.

In 1963, the Solicitor addressed the applicability of the Leasing Act of May 11, 1938 to the Reserve. The Act applied to land "under Federal jurisdiction." The Solicitor concluded as to the 1891 Act setting aside the reservation that "it would be hard to envisage any clearer description of an Indian reservation" and that the lands comprised a reservation subject to mineral leasing. Solicitor Opinion M-36658, 70 I.D. 363 (July 19, 1963).

All of these actions and opinions express a clear view that the Annette Islands Reserve is a federal Indian reservation and is, as such, Indian country subject to the

federal laws applicable to Indian country (including P.L. 280). The Executive Branch has clearly indicated its understanding that the Reserve is a statutory Indian reservation under the jurisdiction of the United States and constitutes "Indian country" for jurisdictional purposes.

III. THE STATE AND AMICI ASSERTIONS THAT METLAKATLA IS NOT INDIAN COUNTRY ARE ERRONEOUS.

At p. 6 of its brief, Petitioner State of Alaska asserts that Indian country does not exist in Alaska. For support it cites *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 51-52 (1962). Amici Alaska Fish and Wildlife Federation and Outdoor Council, Inc., and Alaska Fish and Wildlife Conservation Fund, Inc., make a similar assertion at pp. 5, 22 of their brief. In both instances the parties assert that "this court" has so held.

Metlakatla v. Egan concerned the right of the Community to operate fish traps which were prohibited by State law. The Secretary of the Interior promulgated regulations permitting fish traps applicable to the Reserve. At issue was the Secretary's authority to do so. The Court held the regulations would be valid if promulgated pursuant to the 1891 Act, and the Community could operate free of State law. 369 U.S. at 59.

An examination of this Court's decision in *Egan*, particularly the phrase quoted by the State and Amici, shows that this quote was taken out of context. The Court was describing the State's position. At p. 51, the Court says "the state tells us," and goes on to describe the State's position, including a specific reference to a holding by an Alaskan federal district court in *United States v. Booth*, 161 F. Supp. 269 (D. Alaska 1958) that the Metlakatla Reserve was not Indian country.⁶ This Court

did not hold that the Reserve is not Indian country. It merely documented a lower court finding. So the assertion that this Court made a holding is simply wrong.

Moreover, the finding in *Booth* has never been repeated, and it is flatly wrong since it fails to recognize the significance of the fact that, when Congress established the Annette Islands Reserve, it expressly stated the Islands were to be "set apart as a reservation." See 25 U.S.C. § 495. In his 1963 opinion, the Interior Solicitor expressly disagreed with *Booth* when he held Metlakatla was an Indian reservation. See Solicitor's Opinion M-36658, 70 I.D. 363, n.8. Further, *Booth* fails to take account of the Congressional affirmations of reservation status, as described above, and the decision was made prior to the

pled guilty to driving under the influence of intoxicating liquor under territorial law. The court discussed the question of jurisdiction and the "Indian country" status of the Annette Islands Reserve although the defendant did not contest the court's jurisdiction or the application of the territorial laws to the Reserve. The court concluded that the Annette Islands Reserve was not "an Indian reservation in the traditional sense" because among other reasons, "the entire population of Metlakatla could move to Ketchikan, even against the will of the Alaska Native Service and the Department of the Interior" and because "Metlakatla could conceivably become a community predominantly Eskimo and Aleut. There is nothing in the Indian country statute that expresses an intent to govern Eskimos and Aleuts or groups containing Eskimos or Aleuts, or, for that matter, Alaska Natives generally or immigrant Indian communities." The court also states that Metlakatla "has no tribal organization" although at the time of the decision (1958), as at present, the Community governed itself under a Constitution and Bylaws approved by the Secretary of the Interior under the Federal Indian Reorganization Act. 25 U.S.C. § 476. The discussion and conclusion in *Booth* that the Annette Islands Reserve is not an Indian reservation and, therefore, not Indian country, is clearly inconsistent with the relevant statutory provisions and caselaw and relies on irrelevant reasons to conclude that the Reserve is not Indian country. In fact it has been said that *Booth* is contrary to several Supreme Court precedents and that its reasoning is extremely doubtful. See Cohen, *Handbook of Federal Indian Law*, p. 765, n.228 and p. 345, n.139 (1982 ed.).

⁶ *Booth* was a criminal prosecution under the laws of the Territory of Alaska in the Federal District Court for Alaska. The defendant

enactment of the 1958 amendment to Pub. L. 280 providing for State jurisdiction in Indian country in Alaska, as well as to the Metlakatla-specific amendment in 1970, which specifically refers to the Annette Islands Reserve as Indian country. *Booth* also is inconsistent with all of the Executive Branch interpretations and assertions of federal jurisdiction over the Reserve, noted above.

There can be no doubt that the Reserve fits squarely within the definition of Indian country in 18 U.S.C. § 1151(a) as "land within the limits of any Indian reservation under the jurisdiction of the United States Government."

IV. AMICI ASSERTIONS THAT THE STATE HAS COMPLETE JURISDICTION OVER FISHING IN THE RESERVE IS ERRONEOUS.

Amici also assert that this Court concluded in *Metlakatla v. Egan* that "the State of Alaska had received complete jurisdiction." Amici Brief, p. 21. This Court made no such finding as to Metlakatla. Rather the Court in *Egan* recognized that federal authority over the reservation was established in the 1891 statute creating the reservation. 369 U.S. at 52. This Court further recognized that this statute authorized the Secretary of the Interior to promulgate rules and regulations to govern fishing within the reservation and *precluded* state jurisdiction. 369 U.S. at 59.

The regulations, promulgated under the authority of the 1891 Act, 25 U.S.C. § 495, formerly codified at 48 U.S.C. § 358, provide that the Annette Islands Reserve is an "exclusive" fishery, 25 C.F.R. § 241.2(b) (1963), and that any persons fishing therein without authority of the Community "shall be subject to prosecution under the provisions of section 2 of the Act of July 2, 1960 (74 Stat. 469, 18 U.S.C. § 1165)." *Id.* Section 1165 makes it a federal crime for any person to go upon Indian trust

or reserved land without permission for the purpose of hunting or fishing.

Thus, the federal government has properly asserted its authority and the authority of the Community over fishing on the Reserve to the exclusion of the State because the Reserve is a federal reservation under its supervision. This Court distinguished *Metlakatla v. Egan*, from its companion case, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) based on the existence of a reservation. The court said:

"The situation here differs from that of the Metlakatlans in that neither Kake nor Angoon has been provided with a reservation and in that there is no statutory authority under which the Secretary of the Interior might permit either to operate fish traps contrary to state law."

369 U.S. at 62.

Even the Supreme Court of Alaska recognized, in *Atkinson v. Haldane*, 569 P.2d 151, 156 (Alaska 1977), that the Secretary's regulations preempt State law because the Metlakatlans occupy a reservation.

Finally, Amici assert that in Alaska "Congress generally did not provide special or exclusive Indian rights in wildlife . . ." Amici Brief, p. 19. To the contrary, the Annette Islands Reserve includes the waters surrounding the Annette Islands for the purpose of providing an exclusive fishery. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 90 (1918).

CONCLUSION

Metlakatla disputes any assertion or implication that its reservation is not Indian country, or that its exclusive fishery is not specifically reserved, or that it, or its members are subject to state laws (except to the extent expressly provided in Public Law 280). We respectfully request this Court avoid making any statements or

findings that will impinge on the unchallenged authority of the Metlakatla Indian Community or the Federal government over its reservation or its fishery. Indeed, if this Court addresses Metlakatla at all, it should be to acknowledge it is a federal Indian reservation and therefore Indian country under 18 U.S.C. § 1151(a).

Respectfully submitted,

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